

No. 12438

United States
Court of Appeals
For the Ninth Circuit.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO,
Executor of the Last Will and Testament of
Sanford Plummer, Deceased; CROCKER FIRST NAT'L
BANK OF S.F., Executor of the Last Will and
Testament of Caroline Alice Plummer, Deceased,
as an Individual and distributee; CROCKER FIRST
NAT'L BANK OF S.F., as Trustee and Distributee
of the Estate of Sanford Plummer, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeals from the United States District Court,
Northern District of California,
Southern Division.

FILED
FEB 2 - 1950

PAUL P. O'BRIEN,

No. 12438

United States
Court of Appeals
For the Ninth Circuit.

CAROLINE ALICE PLUMMER and CROCKER
FIRST NATIONAL BANK OF SAN FRAN-
CISCO, Executors of the Last Will and Testa-
ment of Sanford Plummer, Deceased, CARO-
LINE ALICE PLUMMER, as an Individual
and Distributee, CROCKER FIRST NA-
TIONAL BANK OF SAN FRANCISCO, as
Trustee and Distributee of the Estate of San-
ford Plummer, Deceased,

Appellants,

vs.

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Appellee.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States, In and
For the Northern District of California, South-
ern Division

No. 26199-G

CAROLINE ALICE PLUMMER and CROCKER
FIRST NATIONAL BANK OF SAN FRAN-
CISCO, Executors of the last Will and Testa-
ment of SANFORD PLUMMER, deceased,
CAROLINE ALICE PLUMMER, as an in-
dividual and distributee, CROCKER FIRST
NATIONAL BANK OF SAN FRANCISCO,
as trustee and distributee of the estate of
Sanford Plummer, deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

AGREED STATEMENT OF THE CASE ON APPEAL

It is hereby stipulated by and between the parties
hereto as follows:

That the questions presented by the appeal of
Caroline Alice Plummer and Crocker First National
Bank of San Francisco, Executors of the last Will
and Testament of Sanford Plummer, deceased, Caro-
line Alice Plummer, as an individual and distribu-
tee, Crocker First National Bank of San Francisco,
as trustee and distributee of the estate of Sanford

Plummer, deceased, can be determined without an examination of all the pleadings, evidence and proceedings in the District Court of the United States, in and for the Northern District of California, Southern Division.

That the following is a true statement of the case showing how the questions arose and were decided in the aforesaid District Court and that the following are so many of the facts averred and proved as are essential to a decision of the questions by the United States Court of Appeals for the Ninth Circuit.

This action was tried upon appropriate pleadings, to-wit, plaintiffs' complaint and defendant's answer thereto.

An "Agreed Statement of Facts" was signed by the parties hereto and filed with the Court, which Agreed Statement of Facts formed the basis for the Court making the following

"Findings of Fact."

I.

"This is an action to recover estate tax and interest, brought against the United States of America under the Revenue Laws of the United States.

II.

Sanford Plummer died on the 23rd day of May, 1941, being at that time a citizen of the United States of America and a resident of the County of Alameda, State of California, leaving a last Will

and Testament and estate within the State of California, and elsewhere. In said Will, plaintiffs above named, Caroline Alice Plummer and Crocker First National Bank of San Francisco, were appointed as Executors thereof. Thereafter, and on the 28th day of May, 1941, said Will was filed in the Superior Court of the State of California, in and for the County of Alameda, together with a petition for the probate thereof and the appointment of said plaintiffs as the Executors thereof and of said estate. Thereafter, such proceedings were regularly had and taken in the matter of said proceeding that on the 17th day of June, 1941, the order of said Superior Court was duly and regularly made and filed therein, admitting to probate the said Will of said deceased and appointing the plaintiffs above named, Caroline Alice Plummer and Crocker First National Bank of San Francisco, as Executors of said Will and of said estate, upon their qualifying according to law; that thereafter, and on the 17th day of June, 1941, said plaintiffs qualified accordingly, whereupon Letters Testamentary were issued to said plaintiffs, Caroline Alice Plummer and Crocker First National Bank of San Francisco, as Executors of the last Will and Testament of said Sanford Plummer, deceased, whereupon they became, ever since have been, and still are, the duly appointed, qualified and acting Executors of the last Will and Testament of Sanford Plummer, deceased.

III.

Plaintiff, Crocker First National Bank of San Francisco, is a National banking association, organized and existing under and by virtue of the laws of the United States, pertaining to National banks, and as such is authorized and empowered to act as an Executor of Wills and to conduct a trust business.

Plaintiff, Caroline Alice Plummer, is and has been, for many years last past, a citizen of the United States of America, and a resident of the County of Alameda, State of California.

Said plaintiff, Crocker First National Bank of San Francisco, has an office in the City and County of San Francisco, State of California, within the first internal revenue collection district of the State of California, and within the jurisdiction of the District Court of the United States for the Northern District of California, Southern Division thereof.

IV.

“Thereafter, such proceedings were regularly had and taken in said Superior Court, in the administration of the estate of said deceased, that on the 11th day of August, 1942, a decree of distribution of the estate of said deceased was duly and regularly made and filed and entered in the records of said proceeding, distributing said estate to the persons entitled thereto, as set forth in the said decree of distribution. Said decree provided, among other things, as follows:

‘It Is Further Ordered, Adjudged And Decreed that distribution of said estate in the manner, to the extent, and to the persons hereinafter respectively set forth, and in accordance with the provisions of said Will of said deceased, and in accordance with the plan of distribution hereinabove referred to, be and the same is hereby ordered as follows: (A) To Caroline Alice Plummer, all that real and personal property more particularly described as follows, to-wit:’

(Thereafter follows the description of various real and personal properties.) Included therein is the following:

‘(7) An undivided three-quarters interest in and to any other property not now known or discovered, which may belong to said estate, or in which said estate may have an interest, and any property distribution of which has not been included or referred to herein or in the inventory on file herein, which may belong to said estate, or in which said estate may have an interest.’

(B) To Crocker First National Bank of San Francisco, the property thereafter described, in trust for the purposes thereafter set forth. Included therein is the following:

‘(4) An undivided one-quarter interest in and to any other property not now known or discovered which may belong to said estate, or in which said estate may have an interest, and any property distribution of which has not been included or referred to herein or in the inventory on file herein, which

may belong to said estate, or in which said estate may have an interest.'

Said distributee, Caroline Alice Plummer, is one of the plaintiffs hereinabove named.

Said Crocker First National Bank of San Francisco, named as such trustee, is one of the plaintiffs above named.

V.

The claim of plaintiffs, Caroline Alice Plummer and Crocker First National Bank of San Francisco, as Trustee, is the property of said plaintiffs, as distributees, under the said decree of distribution in the said estate of Sanford Plummer, deceased, and said plaintiffs' rights have not been assigned by them to any person, firm or corporation.

VI.

Said Sanford Plummer, deceased, and said Caroline Alice Plummer married in the State of California on the 1st day of March, 1904, and thereafter continued to live together as husband and wife, and as residents of the State of California, at all times from the time of their marriage above stated until the death of said Sanford Plummer on the 23rd day of May, 1941.

VII.

Said Sanford Plummer did, on the 17th day of September, 1939, declare, in writing, in his last Will, copy of which is attached to the complaint in the above entitled action, marked "Exhibit 1," that all of the property owned or possessed by him was

the community property of himself and his wife, Caroline Alice Plummer. Said declaration in said Will is in the following language:

‘Second. I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer.’

VIII.

As hereinabove stated, paragraph IV hereof, the decree of final distribution of the estate of said deceased was duly and regularly made and filed on the 11th day of August, 1942, in the said probate proceedings, pending in the said Superior Court. Said decree of said Court contains, in part, the following provision thereof:

‘The Court finds that in Paragraph Second of said Will, the said testator declared that all of the property owned or possessed by him had been acquired since his marriage to his wife, Caroline Alice Plummer, and that the whole thereof was the community property of himself and his said wife, Caroline Alice Plummer, which said declaration of said deceased is confirmed by this Court.

The Court finds that the said testator, under the provisions of paragraph Third of his said Will, confirmed the right of his surviving wife, Caroline Alice Plummer, upon his death to receive one-half of all the community property and by way of confirming the same, said testator gave, devised and

bequeathed to his said wife, Caroline Alice Plummer, the said one-half portion of the said community property.

The Court further finds that the Honorable A. T. Shine, the duly appointed, qualified and acting Inheritance Tax Appraiser of this estate, has filed a report in this estate, which report is now on file herein, wherein it is found by the said Inheritance Tax Appraiser that all of the estate of said deceased was and is the community property of said deceased and his said surviving wife, Caroline Alice Plummer. This Court confirms the said report of the said Inheritance Tax Appraiser that all of the estate of said deceased was and is the community property of said deceased and his said surviving wife, Caroline Alice Plummer.

The Court therefore further finds that the said Caroline Alice Plummer is entitled to receive and to have distributed to her one-half of the estate of said deceased, without any deduction therefrom by reason of the payment or discharge of any of the legacies or devises created by the provisions of Paragraphs Fourth and Fifth and the various subparagraphs of Paragraphs Fifth of said Will.'

IX.

On or about the 18th day of June, 1942, plaintiffs, as such Executors, filed with the Collector of Internal Revenue for the First Collection District of California, a Federal estate tax return, Form 706, for the said estate of Sanford Plummer, deceased. Plaintiffs returned in said estate tax return one-half

only of the property owned by said decedent and said Caroline Alice Plummer at the time of the death of said Sanford Plummer, standing in the names of them, or either of them, at the time of the death of said Sanford Plummer. Said Federal estate tax return showed a total estate tax payable of \$12,727.46; that said Federal estate tax, so shown to be due, was duly paid by plaintiffs, as such Executors of said estate, to the Collector of Internal Revenue for the First Collection District of California, at San Francisco, California, on the 18th day of June, 1942.

X.

Thereafter, the Commissioner of Internal Revenue for the United States of America, through his duly constituted agent, audited said Federal estate tax return, Form 706, filed by plaintiffs on behalf of the estate of said Sanford Plummer, deceased, and in connection with said audit, said Commissioner of Internal Revenue ruled against the claim of plaintiffs that all of the property owned by decedent and said Caroline Alice Plummer, his wife, at the date of decedent's death, was the community property of both of them, and that under the laws of the State of California each had a present, existing and equal interest therein, and said Commissioner of Internal Revenue included in decedent's gross estate, for the purpose of determining the Federal estate tax, nine-tenths thereof, instead of one-half thereof.

XI.

The Commissioner of Internal Revenue determined a deficiency in federal estate tax of the Estate of Sanford Plummer, deceased, in the sum of \$21,874.78 and a total estate tax liability of \$34,602.24, which plaintiffs, as such Executors, did pay, at San Francisco, California, to Honorable Harold L. Berliner, Collector of Internal Revenue of the United States for the First District of California, then in office, the amount of said alleged deficiency tax, to-wit, \$21,874.78 and interest thereon from the 23rd day of August, 1942, to the 12th day of January, 1943, at the rate of 6% thereof, or the sum of \$510.40, a total payment on said 12th day of January, 1943, of \$22,385.18.

XII.

Prior to the commencement of this action, the said Harold L. Berliner, to whom the above payments were made, resigned as Collector of Internal Revenue for the First District of California, and said Harold L. Berliner no longer holds the office of Collector of Internal Revenue for the First District of California.

XIII.

On or about the 31st day of March, 1944, plaintiffs, as Executors of the Last Will and Testament of Sanford Plummer, deceased, filed with the said Honorable Harold L. Berliner, Collector of Internal Revenue for the First District of California, at San Francisco, California, a claim for refund of said tax and interest, collected by defendant; that said claim for refund was filed within the time pro-

vided therefor and in accordance with the provisions of law pertaining thereto and the regulations established in pursuant thereof.

XIV.

Thereafter, and under date of August 31, 1944, plaintiffs, as such Executors, received from the Commissioner of Internal Revenue of the Treasury Department of the United States, at Washington, D.C., a letter, notifying plaintiffs that the claim filed by them on April 3, 1944, hereinabove referred to, for the refund of \$21,874.78, together with the said additional sum paid as interest thereon, viz, the added sum of \$510.40, together with interest upon the whole thereof, was rejected in its entirety.

No part of said sum of \$21,874.78 and \$510.40, or the aggregate amount thereof, viz, the sum of \$22,385.18, or interest thereon, has been refunded or repaid to plaintiffs, or either of them, or any person on their behalf; that there are no off-sets of any kind or nature against said claim."

In addition to the "Agreed Statement of Facts," hereinbefore referred to, certain documentary evidence was introduced at the trial of said action, which documentary evidence was to this effect:

1. That Sanford Plummer filed individual Federal income tax returns for the calendar years 1939-1940 and for prior years, wherein he reported only 20% of the income received by him on investments in stocks and bonds as community income divisible with his wife.

Said income tax returns for the calendar years 1939 and 1940 contained the following statements:

“This taxpayer contends that substantially all of his income from dividends constitutes community income in which his wife has a one-half interest. On the basis of revenue agents’ reports, covering examinations of taxpayer’s income tax return and those of his wife for the years 1935 to 1937, only 20% of income on the above securities is reported as community income.”

“This taxpayer contends that substantially all of his interest income constitutes community income in which his wife has a vested one-half interest. In order to avoid a controversy on the basis of revenue agents’ reports covering examinations of this taxpayer’s income tax returns for the years 1935 to 1937, only 20% of the income on the above securities was reported as community income in this return.”

2. It was stipulated at the trial of said action that Scott Dunham, the accountant who prepared the income tax returns of said Sanford Plummer, if called as a witness in said action, would testify as to all matters of fact contained in the following affidavit:

“State of California

City and County of San Francisco

Scott Dunham, being first duly sworn, deposes and says:

I am now, and for some years last past, have been associated with John F. Forbes & Company, certi-

fied public accountants, with offices in the City of San Francisco, and elsewhere throughout the United States.

I personally knew Sanford Plummer, a resident of the County of Alameda, State of California, who died on May 23, 1941.

The said Sanford Plummer engaged the services of the said John F. Forbes & Company to prepare his Federal and California individual income tax returns and those of his wife, Caroline A. Plummer, for the calendar years 1939 and 1940.

Affiant personally gave his attention to the preparation of said returns. In connection therewith, affiant made inquiry of the said Sanford Plummer relating to the community status of property and income of himself and wife. Said Sanford Plummer advised affiant that substantially all of his property constituted community property and he desired to know the distinction between community property acquired prior to July 29, 1927, and community property acquired subsequent to that date.

Affiant advised Sanford Plummer that community property acquired prior to July 29, 1927, was treated, for Federal and State income tax purposes, as property in which the wife had only an expectancy and that income derived on such property, for Federal and State income tax purposes, was treated as though it constituted the income of the husband. Affiant also advised said Sanford Plummer that community property acquired subsequent to July 29, 1927, ex-

clusive of income derived after that date on community property acquired prior to that date, constituted community property in which husband and wife had equal interests under the provisions of Section 161(a) of the Civil Code. Affiant outlined the policy followed by the Treasury Department and the California Franchise Tax Commissioner in determining what constituted community property and income acquired subsequent to July 29, 1927.

Said Sanford Plummer advised affiant that according to the best of his information, a substantial part of his estate consisted of community property acquired subsequent to July 29, 1927. He advised that his former tax adviser had carefully considered this matter and that the Treasury Department had conceded that 20% of his income from dividends and interest constituted community property in which he and his wife had equal one-half interests and that the remainder of the income constituted community income taxable to Sanford Plummer. Said Sanford Plummer advised affiant that, in his opinion, more than 20% of his estate constituted community property in which he and his wife had vested interests. He advised, however, that he did not desire to have further tax controversies or arguments with either the Treasury Department or the State Franchise Tax Commissioner relating to his personal income tax liabilities and those of Mrs. Plummer. According to his instructions, affiant was to treat 20% of the income derived from dividends and interest as community income divisible equally between said Sanford Plummer, and Caroline A. Plummer, his

wife. The remainder of the income from these securities was to be treated as community income taxable to said Sanford Plummer. Affiant followed this procedure in preparing the Federal and State income tax returns of Sanford Plummer and of Caroline A. Plummer for the years 1939 and 1940. Pursuant to affiant's conference with Sanford Plummer, affiant did not make an independent investigation in order to determine the community status of property and income owned by said Sanford Plummer.

There is a note in the files of John F. Forbes & Company to the effect that Revenue Agents' Reports for the years 1935 to 1937 classified 20% of the income received on stocks and bonds as income divisible equally between said Sanford Plummer and Caroline A. Plummer. In light of this fact and of information submitted to affiant by said Sanford Plummer, affiant followed the procedure of classifying 20% of income received on investments in stocks and bonds as divisible community income in filing the income tax returns of Sanford Plummer and Caroline A. Plummer for the years 1939 and 1940.

SCOTT DUNHAM.

Subscribed and sworn to before me this 23rd day of June, 1943.

W. W. HEALEY,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 3, 1946.

3. The letter from the Commissioner of Internal Revenue, rejecting plaintiffs' claim for refund, reads as follows:

Treasury Department

Washington 25

Office of Commissioner of Internal Revenue

MT-ET-11271-1st California

Estate of Sanford Plummer

Date of death—May 23, 1941

Crocker First National Bank

of San Francisco, et al., Executors,

1 Montgomery Street

San Francisco, California

Aug. 31, 1944.

Gentlemen:

Reference is made to the claim on Form 843 filed April 3, 1944, for the refund of \$21,874.78, Federal estate tax paid on behalf of the above-named estate. It is contended that all property of the decedent acquired before or after July 29, 1927, (the effective date of section 161 of the Civil Code of California) should be treated for estate tax purposes as community property and only one-half thereof should be included for tax.

It appears that subsequent to July 29, 1927, decedent returned for Federal income tax 80 per cent of all income from investments as separate property. The remaining 20 per cent was treated as com-

munity property. This division of separate and community property was followed for Federal estate tax and the tax liability determined on that basis.

This question has been considered many times by the United States Board of Tax Appeals (now The Tax Court of the United States) and the courts and it has been repeatedly held that the interest of the surviving wife in community property acquired prior to July 29, 1927, is includible in the gross estate of the deceased husband for Federal estate tax. *United States v. Robbins*, 269 U. S. 315. Also see *Gump v. Commissioner*, 42 B.T.A. 197; affirmed 124 Fed. (2d) 540, certiorari denied 62 S. Ct. 1292 and authorities cited therein. The statement in the decedent's will to the effect that all property was acquired since marriage and the whole thereof is community property is not equivalent to an agreement made during decedent's lifetime transferring separate property into community property in which the wife had a vested interest.

In view of the foregoing, the claim filed April 3, 1944, for the refund of \$21,874.78 is rejected in its entirety.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner.

By /s/ ADELBERT CHRISTY,

Acting Deputy Commissioner.

Based upon the foregoing documentary evidence, the Court made the following further Findings of Fact:

“XV.

Sanford Plummer filed individual federal income tax returns for the calendar years 1939-1940, and for prior years wherein he reported only 20% of the income received by him on investments in stocks and bonds as community income divisible with his wife.

XVI.

Not more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of community property acquired by himself and his wife subsequent to July 29, 1927, in which she had a present or ‘vested’ interest at the time of his death.”

The foregoing Findings of Fact, numbered I to XVI, inclusive, constitute all of the Findings of Fact in said action.

After submission of the cause, and on July 25, 1949, and before the making of the aforesaid Findings of Fact, the Honorable Louis B. Goodman, Judge of said Court, caused to be filed herein his Order for Judgment, which reads as follows:

Original Filed July 25, 1949, Clerk, U. S. Dist. Court, San Francisco.

In the United States District Court for the North-
ern District of California, Southern Division
No. 26199-G

CAROLINE ALICE PLUMMER, et al.,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.

ORDER FOR JUDGMENT

In this action, plaintiffs seek refund of estate taxes paid in the sum of \$21,874.78 upon the ground that the Commissioner erroneously included in decedent Sanford Plummer's statutory gross estate, the entire value of all property standing in his name at death (May 23, 1941). The Commissioner's alleged error, urged in a claim for refund, which was administratively denied, and reasserted here, is that such property was community property since September 17, 1939 (date of decedent's last will), in which decedent's wife had a present, vested and equal interest. The basis of the claim, that the wife had such half interest, is that in his last will, the decedent declared his property to be of the community.

There is no doubt and both sides so concede, that under California statutes and federal decisions, since July 29, 1927¹ in California, the wife has a 'present,

¹Calif. Civil Code, Sec. 161a; *United States v. Malcolm* 282 U. S. 792; *Sherman v. Commissioner*, 9 Cir. 76 F. 2d 810; *Shea v. Commissioner*, 9 Cir. 81 F. 2d 937.

existing and equal interest' in community property, and that by agreement the husband and wife can fix or transmute their property from separate to community or vice versa.²

The sole question here posed is whether the declaration in the decedent's will³ is equivalent to such an agreement.

Neither good reason or cited precedent sustain plaintiff's contention. The declaration in decedent's will was unilateral. The will itself was ambulatory.⁴ It spoke only as of the date of death and could have been revoked or modified at any time. None of the fundamentals of contract inhered in it.

The cases cited by plaintiff are not apposite.⁵

²Calif. Civil Code, Sects. 158, 159, 160; *Re Freitas*, 16 F. Supp. 557; *Sampson v. Welch*, 23 F. Supp. 271; *Kenney v. Kenney*, 220 Cal. 134, 30 P. 2d 398; *Siberell v. Siberell*, 214 Cal. 767, 7 P. 2d 1003.

³The declaration is as follows:

"Second: I do hereby declare that all of the property owned or possessed by me has been acquired since my marriage to my wife, Caroline Alice Plummer, and the whole thereof is community property of myself and my wife, Caroline Alice Plummer."

⁴68 C. J. 602; *Nichols v. Emery*, 109 Cal. 323, 329, 41 Pac. 1089; *Niccols v. Niccols*, 168 Cal. 444, 143 Pac. 712.

⁵In *Bank of America v. Rogan*, 33 F. Supp. 183, there was an agreement signed by both husband and wife; In *Estate of Watkins*, 16 Cal. 2d 793, there were joint and mutual wills, held to constitute a contract; *Herman v. Mortensen*, 72 Cal. App. 2d 413, concerned an inter vivos gift.

Judgment for defendant. Prepare findings pursuant to the Rules.

Dated: July 25, 1949.

LOUIS E. GOODMAN,
U. S. District Judge."

The aforesaid Findings of Fact were lodged herein, together with certain conclusions of law, reading as follows:

"CONCLUSIONS OF LAW

I.

"The provisions of the will of Sanford Plummer, deceased, did not amount to an agreement between himself and Caroline Alice Plummer, converting either his separate property or their community property acquired prior to July 29, 1927, into the type of California community property in which the wife held a present or 'vested' interest within the meaning of Section 161(a) of the California Civil Code.

II.

That no more than twenty per cent of the gross estate of Sanford Plummer, deceased, consisted of California community property of the type defined by Section 161(a) of the California Civil Code.

III.

That the Commissioner of Internal Revenue correctly determined the gross estate of Sanford Plummer, deceased, for Federal Estate Tax purposes.

IV.

That the estate of Sanford Plummer, deceased, did not overpay its Federal Estate Tax.

V.

That plaintiffs are entitled to no recovery in this action.

VI.

That the defendant is entitled to a judgment of dismissal and for its costs to be taxed by the clerk of this Court against the plaintiffs in this action.”

Judgment was entered on August 4, 1949, in favor of defendant. Said judgment reads as follows:

“In the United States District Court for the Northern District of California, Southern Division

No. 26199-G

CAROLINE ALICE PLUMMER and CROCKER
FIRST NATIONAL BANK OF SAN FRANCISCO,
Executors of the Last Will and Testament of
SANFORD PLUMMER, Deceased, and
CAROLINE ALICE PLUMMER, as an Individual
and Distributee, CROCKER FIRST NATIONAL
BANK OF SAN FRANCISCO, as Trustee and
Distributee of the Estate of SANFORD
PLUMMER, Deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action was submitted to the Court for decision upon the pleadings, and ‘Agreed Statement of Facts’ and the briefs of the parties and the Court after consideration of the same made its Findings of Fact and Conclusions of Law;

Now, therefore, It Is Ordered, Adjudged and Decreed that plaintiffs take nothing by this action but that the defendant do, and it hereby does, have judgment against plaintiffs for dismissal of this

action and defendants' costs taxed in the sum of
\$.

Dated this 3rd day of August, 1949.

LOUIS E. GOODMAN,
U. S. District Judge.

Approved as to form as provided by Rule 5(d) of
this Court.

.,
.,
Attorneys for Plaintiffs."

Plaintiffs thereupon duly and timely noticed a motion for a new trial, to open the judgment, amend the findings of fact and conclusions of law, and for the entry of a new judgment.

Said motions were heard by the aforesaid Judge Goodman on the 21st day of September, 1949, and argued orally by counsel for plaintiff and defendant, respectively, and submitted for the decision of said Court, and on the 22nd day of September, 1949, said motions were, and each of them was, severally denied by the Judge of said Court, the Honorable Louis E. Goodman.

Thereafter, and on the 30th day of September, 1949, said plaintiffs duly filed their notice of appeal from said judgment. A copy of said notice of appeal, with its filing date, is as follows:

“In the District Court of the United States, in and for the Northern District of California, Southern Division.

No. 26199-G

CAROLINE ALICE PLUMMER and CROCKER
FIRST NATIONAL BANK OF SAN FRANCISCO, Executors of the Last Will and Testament of SANFORD PLUMMER, Deceased,
CAROLINE ALICE PLUMMER, as an Individual and Distributee, CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, as Trustee and Distributee of the Estate of SANFORD PLUMMER, Deceased,
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant and Appellee.

NOTICE OF APPEAL

Notice Is Hereby Given that Caroline Alice Plummer and Crocker First National Bank of San Francisco, Executors of the last Will and Testament of Sanford Plummer, deceased, Caroline Alice Plummer, as an individual and distributee, and Crocker First National Bank of San Francisco, as trustee and distributee of the estate of Sanford Plummer, deceased, plaintiffs above named, hereby appeal to the United States Court of Appeals for

the Ninth Circuit from the final judgment entered in this action on August 4, 1949.

J. J. LERMEN,
GEORGE DEVINE,

Attorneys for Appellants, Caroline Alice Plummer and Crocker First National Bank of San Francisco, Executors of the Last Will and Testament of Sanford Plummer, Deceased, Caroline Alice Plummer, as an Individual and Distributee, and Crocker First National Bank of San Francisco, as Trustee and Distributee of the Estate of Sanford Plummer, Deceased. Address: Balboa Building, San Francisco, California."

Filed Sept. 30, 1948, Clerk, U. S. Dist. Court, San Francisco.

On said 30th day of September, 1949, said plaintiffs duly filed herein their bond on appeal in the sum of \$250.00.

The foregoing may be used as a statement of facts as the record on appeal.

/s/ J. J. LERMEN,

/s/ GEORGE DEVINE,

Attorneys for Plaintiffs and
Appellants..

/s/ FRANK J. HENNESSY,

/s/ C. EMMETT COLLETT,

Attorneys for Defendant and
Appellee.

STATEMENT OF APPELLANTS' POINTS

A concise statement of the points to be relied upon by appellants is as follows:

1) The case is to be governed by the law of California.

2) In California, since July 29, 1927, the wife has a "present, existing and equal interest" in community property.

3) In California, husband and wife may fix the character of their property by agreement, oral or in writing.

4) The statement by the deceased, Sanford Plummer, in his Will that all of his property was the community property of himself and his wife, Caroline Alice Plummer, was and is the equivalent of an agreement to that effect between said Sanford Plummer and his said wife, Caroline Alice Plummer.

5) Said statement of deceased was confirmed by the decree of the Superior Court of the State of California, in and for the County of Alameda, determining that all of the property of the estate of said decedent was community property of himself and his said wife, and finally distributing the estate of said decedent to the parties entitled thereto.

6) Said statement, being entirely for the benefit of said Caroline Alice Plummer, and for her benefit alone, is presumed by law to have been ac-

cepted by her, and said presumption, not being controverted by other evidence, either direct or indirect, is evidence of the fact of such acceptance.

7) Said statement by Sanford Plummer in his Will that all of his property was community property had the effect of vesting in plaintiff, Caroline Alice Plummer, a present, existing and equal interest in all of his estate.

8) Only one-half of the estate of the deceased, Sanford Plummer, should be included in the gross estate of said deceased, subject to the imposition and payment of any Federal estate tax in effect on the date of the death of said deceased, namely, May 23rd, 1941.

9) Plaintiffs and appellants are therefore entitled to a judgment in their favor for the refund prayed for in their complaint.

/s/ J. J. LERMEN,

/s/ GEORGE DEVINE,

Attorneys for Plaintiffs and
Appellants.

The foregoing statement of the case on appeal is hereby approved.

Dated this 23rd day of December, 1949.

/s/ LOUIS E. GOODMAN,

Judge of the U. S. District
Court.

[Endorsed]: Filed December 23, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing document, listed below, is the original filed in this Court, in the above-entitled case, and that it constitutes the Record on Appeal herein, to wit:

Agreed Statement of the Case on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of December, A.D. 1949.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12438. United States Court of Appeals for the Ninth Circuit. Caroline Alice Plummer and Crocker First National Bank of San Francisco, Executors of the Last Will and Testament of Sanford Plummer, Deceased, Caroline Alice Plummer, as an Individual and Distributee, Crocker First National Bank of San Francisco, as Trustee and Distributee of the Estate of Sanford Plummer, Deceased, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 27, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Judicial Circuit
No. 12438

CAROLINE ALICE PLUMMER, et al.,
Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA,
Defendant and Respondent.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD ON APPEAL

Plaintiffs and appellants hereby designate the Agreed Statement of the Case on Appeal, heretofore filed in the above-entitled Court, as the record to be printed on the appeal of the above-entitled cause.

Plaintiffs and appellants hereby adopt as the points to be relied upon by them upon said appeal the statement of appellants' points contained in the aforesaid Agreed Statement of the Case on Appeal.

/s/ J. J. LERMEN,

/s/ GEORGE DEVINE,

Attorneys for Plaintiffs and
Appellants.

[Endorsed]: Filed Dec. 28, 1949.